REMARKS

Claims 15-24 were pending. Claims 25 and 26 are new. Support for claims 25 and 26 can be found in the specification, for example at page 11, lines 15-17 and Example 2. After entry of this amendment, claims 15-26 are pending.

Consideration and allowance of the pending claims are requested.

35 U.S.C. §103(a)

Claims 15-24 were rejected as allegedly being unpatentable over Weaver (U.S. Patent No. 3,669,684) in view of the combination of Arctander (Methyl Anthranilate), Gross (U.S. Patent No. 3,071,474), Klopping (U.S. Patent No. 4,060,625) and Apple Storage Technologies Article, hereinafter, Apple Article. Applicant respectfully traverses this rejection for at least the following reasons.

To establish a *prima facie* case of obviousness, the Office must establish that (1) the references teach or suggest all claim limitations; (2) there is some suggestion or motivation to combine the references, either in the references or in common general knowledge of one of skill in the art; and (3) there is a reasonable expectation of success (MPEP § 2143).

All currently pending claims are directed either to a post-harvest pome fruit that is at approximately 35°F (hereinafter referred to as a "cold pome fruit"), as well as methods that include storing grape flavored pome fruit at approximately 35°F. Fruit treated with methyl anthranilate that is stored in the cold (see *e.g.* page 5, lines 11-16; page 5 lines, 23-28; and page 12 lines, 17-19 of the specification) has a longer lasting grape flavor than treated fruit that is stored at room temperature. None of the references either alone or combination teach that cold storage of a grape flavored pome fruit at approximately 35°F can enhance the grape flavor within the treated fruit. Claim 21 further emphasizes this difference by requiring the post-harvest pome fruit to be stored for at least one month.

The Office cites Weaver for teaching imparting flavor to already existing food, including pome fruits. However, as correctly noted by the Office, Weaver does not teach a pome fruit

product that includes methyl anthranilate or the method of producing such product as presently claimed. Weaver also does not teach a grape flavored pome fruit that is at approximately 35 °F or the method of producing such product.

To make up for the deficiencies of Weaver, the Office has chosen to rely upon Gross for allegedly disclosing methyl anthranilate as a grape flavoring (Column 7, lines 10-22) and the Apple Article for teaching cold storage of apples at 32°F. As an aside, Applicant agrees that 32°F is approximately 35°F. However, Gross does not make up for the deficiencies of Weaver because Gross merely describes collecting and extracting flavor components from, among other things, grapes. Further, the Apple Article does not disclose, teach or suggest a grape flavored post-harvest pome fruit at 35°F or that cold storage of a post-harvest pome fruit at approximately 35°F enhances the grape flavoring of such fruit. The other cited secondary references Arctander or Klopping do not relate to temperature. Therefore, the Office has failed to establish a *prima facie* case of obviousness because the cited references either alone or in combination do not teach, suggest or disclose all the claim limitations. Applicant respectfully requests that the rejection be withdrawn.

35 U.S.C. §103(a)

Claims 15-18 and 20, 22-23 were rejected as being unpatentable over Shillington *et al.* (U.S. 3,533,810) in view of Arctander (Methyl Anthranilate), Askham (U.S. Patent No. 5,296,226), Gross (U.S. Patent No. 3,071,474), Klopping (U.S. Patent No. 4,060,625) and the Apple Article. Applicant respectfully traverses these rejections for at least the following reasons.

As described above, the independent claims that are presently pending are respectively directed to grape flavored pome fruit at approximately 35°F as well as methods that include storing grape flavored pome fruit at approximately 35°F. None of the references either alone or combination teach a cold pome fruit with an admixture including a methyl anthranilate compound or that cold storage of a fruit at approximately 35°F can enhance the grape flavor within the treated fruit. The primary reference Shillington *et al.* discloses a method of decreasing the susceptibility of fruits and vegetables to deterioration from bacteria, fungi, and

other microorganisms (column 1, line 34). However, it does not teach, suggest or disclose a post-harvest pome fruit or method of processing thereof as presently claimed. For example, nowhere does Shillington *et al.* disclose a pome fruit at approximately 35°F with an admixture including a methyl anthranilate compound or methods that include storing pome fruit at approximately 35°F.

The cited secondary references fail to make up for the deficiencies of Shillington *et al.* As stated above, the Gross reference describes collecting and extracting flavor components from, among other things, grapes. Arctander, Askham or Klopping do not relate to temperature. In fact, Askham teaches the use of methyl anthranilate as a bird repellant and Klopping discloses its use as a fungicide. Further, the Apple Article does not disclose, teach or suggest a grape flavored post-harvest pome fruit at 35°F or that cold storage of a post-harvest pome fruit at approximately 35°F enhances the grape flavoring of such fruit as currently claimed. Therefore, the Office has failed to establish a *prima facie* case of obviousness because the cited references either alone or in combination fail to teach the claimed invention.

It is submitted that one of ordinary skill in the art would not have predicted that a chemical that was used as a bird repellant (Askham) could be used to successfully to produce a pome fruit with grape flavoring that could be consumed by humans and the method by which such fruit was produced would be successful, absent Applicant's present disclosure.

As such, the Office has failed to establish a prima facie case of obviousness and Applicant respectfully requests that it be withdrawn.

35 U.S.C. §103(a)

Claims 19 and 24 were rejected as being unpatentable over Shillington *et al.* (U.S. 3,533,810) in view of Arctander (Methyl Anthranilate), Askham (U.S. Patent No. 5,296,226), and the Apple Article, further in view of Gross (U.S. Patent No. 3,071,474). Applicant respectfully traverses these rejections for at least the following reasons.

The presently pending independent claims are respectively directed to grape flavored

post-harvest pome fruit at approximately 35°F as well as methods that include storing grape flavored pome fruit at approximately 35°F. In particular, claims 19 and 24 further include the limitation of wherein the methyl anthranilate compound is derived from a grape. None of the references either alone or combination teach a cold pome fruit with an admixture including a methyl anthranilate compound derived from a grape or a method of producing such fruit as presently claimed in claims 19 and 24. As described in detail above, the primary reference to Shillington *et al.* discloses a method of decreasing the susceptibility of fruits and vegetables to deterioration from bacteria, fungi, and other microorganisms (column 1, line 34). It does not teach, suggest or disclose a grape flavored post-harvest pome fruit or method of processing thereof as presently claimed. For example, nowhere does Shillington *et al.* disclose a grape flavored pome fruit at approximately 35°F with an admixture including a methyl anthranilate compound derived from a grape or methods that include storing pome fruit at approximately 35°F.

The cited secondary references fail to make up for the deficiencies of Shillington *et al.* As stated above, Arctander or Askham do not relate to temperature. Further, the Apple Article does not disclose, teach or suggest a grape flavored post-harvest pome fruit at 35°F with an admixture including methyl anthranilate derived from a grape or that cold storage such post-harvest pome fruit at approximately 35°F enhances the grape flavoring of such fruit as currently claimed. Therefore, the Office has failed to establish a *prima facie* case of obviousness because the cited references either alone or in combination fail to teach the claimed invention. Further, as stated above, it is submitted that one of ordinary skill in the art would not have predicted that the success of the method or product. For example, one of ordinary skill in the art would not have predicted that a chemical that was used as a bird repellant (Askham) could be used to successfully to produce a pome fruit with grape flavoring that could be consumed by humans and the method by which such fruit was produced would be successful absent Applicant's present disclosure. As such, the Office has failed to establish a *prima facie* case of obviousness and Applicant respectfully requests that the pending rejections be withdrawn.

Commercial Success of Applicant's Invention

Applicant's assertion of non-obviousness is further supported by the commercial success

of the claimed product and the claimed method by which it is made. The Office did not find Applicant's prior submissions of evidence of commercial success persuasive because it continues to question whether the success was derived from marketing efforts rather than public recognition of the uniqueness of the product. The Office requested further evidence to demonstrate that the commercial success of the claimed product is due to the uniqueness of the product and not to marketing efforts.

Although the previously submitted evidence is believe sufficient, submitted herewith is a declaration from Robert A. Mast, who is the head of Columbia Marketing International (CMI) marketing, and has been in the business of marketing produce, such as apples, for over 12 years, as summarized in Exhibit A. Comparative data demonstrating the effect of marketing on the claimed product versus that of other known apples is provided in Exhibit B. This data is from 2009. The exhibit B data is consistent with the previously submitted declaration of Mr. Snyder and even more persuasive. A Euro of apples weighs about 15 pounds of apples (as validated by the Mast declaration). As explained in the accompanying supplemental declaration of Mr. Snyder, the Snyder declaration indicated that a Euro was about 26 pounds. However, Mr. Snyder was including packaging and apples in the 26 pounds. The weight of the apples in a Euro of the Subject Apples was about 15 pounds. Thus, the Subject Apples command an even higher premium than indicated by Mr. Snyder in his earlier declaration as he was dividing the total weight (container plus apples) into the price and not just the weight of the apples.

As demonstrated in Exhibit B, the marketing fee associated with a case of Cameo apples (another niche apple) is 50 cents as compared to the marketing fee for the Subject Apples of one dollar. The total marketing fees collected in 2009 was $318,250 for Cameo apples as compared to $170,000 for the claimed apples. Further, total marketing fees actually spent (used) were 100% of the amounts collected for the Cameo apples as compared to 50% of the amounts collected for the claimed apples. So, although all of the marketing fees collected for the Cameo apples were used to market the apple (and the amount was significantly greater than that used for the claimed product), the average selling price per pound of the claimed apples was greater than 4 times more than that of the Cameo apples. Mr. Mast further attests that similar findings were found with other apples, including Fuji apples, and that he concurs with Mr. Todd Snyder's

previously submitted Declaration. Regular Fuji apples are stated to generally sell for approximately 46¢ per pound. However, Fuji apples, after being subjected to the presently claimed process, are sold for 4 times that amount.

This comparative data supports a finding that it is the uniqueness and flavor of the claimed product and the method by which the product is generated and NOT the marketing efforts that has allowed the claimed product to be commercially successful. Mr. Mast attests in the submitted Declaration that this is his opinion as well, as the marketing budget for the claimed product is significantly less than that spent on other niche varieties while the premium price commanded by the claimed product is significantly higher than that of other niche varieties that are supported by greater marketing dollars. In addition, Mr. Mast recounts consumers' personal accounts of their use of the claimed product that indicate that their consumption is based on the uniqueness of the fruit. For example, Mr. Mast states that several customers commented that there is nothing else on the market to compare to the claimed apples and that their children are drawn to the apples due to their distinct flavor and taste. Moreover, he attested that many mothers have reported that they were able to get their children to eat apples for the first time due to the distinct Grape flavor of the product.

In light of the remarks, claim amendments, and additional declaration and comparative data showing commercial success Applicant believes that the 35 U.S.C. §103(a) rejections have been overcome and respectfully requests that these rejections be withdrawn.

Newly Submitted Claims 25 and 26

Claims 25 and 26 are in condition for allowance for satisfying all of the criteria for patentability for at least the reasons stated above for their parent claim 20. In addition, claims 25 and 26 are novel and non-obvious as none of the cited references of record teach, suggest or disclose a process for imparting grape flavoring to a post-harvest pome fruit product including dipping the fruit in the grape flavoring admixture for no longer than three minutes (claim 25) or from approximately one minute to no longer than three minutes (claim 26). As demonstrated in the specification (see, for example, page 11, lines 15-17 and Example 2), this treatment time allows the grape flavoring of the pome fruit to be enhanced while not resulting in an excessive

grape flavor or scalding the fruit (see page 11, lines 15-20 of the specification). As such, Applicant respectfully requests the allowance of these claims in addition to claims 15-24.

Conclusion

In view of the foregoing, Applicant submits that the application is in condition for allowance and requests that all rejections be withdrawn.

Respectfully submitted,

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